Supreme Court, U.S.
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No. 01-337

In The

Supreme Court of the United States

DAVID KNOX WILSON,

Petitioner,

v.

ATLAS WIRELINE SERVICE/CNA INSURANCE COMPANIES, and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITON TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF QUESTION PRESENTED

Petitioner frames his statement of the question as follows:

> Does the "worsening" of a documented Permanent Total condition render the condition to be classified as Temporary and nullify the original onset of Permanency Status; therefore, denying the claimant annual cost of living increases in his compensation as required by Congress in 33 USC Chapter 18 Section 910(f)?

Throughout his Petition for Writ of Certiorari, however, Petitioner proceeds to ask this court to make several factual determinations including the date of his maximum medical improvement and the nature and extent of his disability. The above referenced statement is therefore not a statement of the question presented to this Court, but rather a confusing conclusion of law premised on several disputed assumptions of fact. Particularly, Petitioner's statement is based on three distinct factual assumptions: (1) that Petitioner is permanently and totally disabled; (2) that he has been since December 19, 1989; and (3) that his disability is exclusively attributable to his alleged lumbar injury. All three of these factual assumptions have been previously determined to the contrary by the Administrative Law Judge and affirmed by the Benefits Review Board. To the extent there was any ambiguity in the findings of the Administrative Law Judge, the United States Fifth Circuit Court of Appeals remanded the case for clarification. As such, Petitioner improperly asks this Court to make factual determinations that are expressly reserved for the Administrative Law Judge.

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CITATIONS OF ORDERS BY COURTS OR ADMINISTRATIVE AGENCIES

The Opinion from which Petitioner seeks certiorari is an unpublished opinion of the United States Fifth Circuit Court of Appeals filed on June 1, 2001.

The Opinion is reproduced in Petitioner's Appendix to his Petition for Writ of Certiorari

No. 00-60511
David K. Wilson, Petitioner
Versus
Atlas Wireline Service/CNA Insurance Companies; Director, Office of Worker's Compensation Programs, U.S. Dept. of Labor.

Benefits Review Board Case Number 99-0607

The Opinion is reproduced in Petitioner's Appendix to his Petition for Writ of Certiorari

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STATEMENT OF JURISDICTION

This Honorable Court should decline the exercise of its supervisory jurisdiction as Petitioner has failed to cite any compelling reasons for doing so as required by Rule 5 of the Rules of the Supreme Court of the United States. Rule 5 also mandates that "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."

The United States Court of Appeals for the Fifth Circuit properly remanded this case to the Administrative Law Judge for a factual determination consistent

with its opinion. Petitioner now asks this Court to make those same factual determinations that the Court of Appeals determined should be left to the Administrative Law Judge. Neither the interpretation nor application of the federal statutes cited by Petitioner are at issue.

STATEMENT OF THE CASE

On December 27, 1988, Wilson allegedly injured his back when he slipped and fell while working on a fixed platform oilrig. He remained on the rig until the next crew boat arrived, at which time he reported the accident. Employer, Atlas Wireline Services, and Carrier, CNA Insurance Companies, Respondents in the instant action, authorized initial medical care consisting of conservative treatment. (Trial Transcript hereinafter "Tr." at pp. 50-53.) On February 9, 1989, Petitioner's choice of neurosurgeon, Dr. Michael Lowry, performed a lumbar hemilaminectomy and diskectomy. The surgery allegedly provided Petitioner immediate relief, but his pain returned and continued over the next several months. After an MRI revealed no evidence of a disc herniation, Dr. Lowry prescribed a TENS unit, which Petitioner alleged helped his back symptoms. (Employer's Trial Exhibits Nos. 6 and 26.)

Dr. Lowry continued to treat Petitioner for the next several years, and after repeated MRIs indicated no significant changes, the physician ordered a myleogram and CT scan. Those diagnostic tests were performed and revealed degenerative changes at L4-L5 and L5-S1, and mild disc bulges at L5-S1. On June 11, 1996, Dr. Lowry

placed a spinal cord stimulator on Wilson's lumbar spine. However, as it did not improve Wilson's condition, Dr. Lowry removed it on June 16, 1996.

On October 10, 1996, Petitioner was implanted with a morphine pump. Wilson responded well to the morphine pump and Dr. Lowry opined Petitioner reached maximum medical improvement ("MMI") on May 19, 1997, given the stability of Wilson's condition from November 1996 through May 1997. (Employer's Trial Exhibits Nos. 6 and 26.) Dr. Lowry opined that Petitioner experienced an increased tolerance of activity after the pump was implanted. He testified that, based upon a reasonable medical probability, Wilson would not be able to return to his previous line of work in the oil field. He testified that Petitioner would be capable of sedentary work with frequent breaks, and imposed lifting restrictions of no more than twenty-five pounds occasionally and under ten pounds repetitively. (Employer's Trial Exhibits Nos. 6 and 26.)

Dr. Lowry also referred Petitioner to Dr. David L. McKellar, a neurologist, who opined that the morphine pump should be the last option for Petitioner given his relatively young age. Petitioner was also seen by Dr. Wendell Helveston, a neurologist, who believed Wilson was vague in describing the nature and localization of his pain. Dr. Helveston opined that the claimant's pain was musculoskeletal rather than radicular, and noted that his complaints about sensory loss were inconsistent with his physiology. Dr. Helveston concurred with Dr. Lowry regarding maximum medical improvement, and recommended a functional capacity examination. Dr. Helveston

also placed lifting restrictions of no more than twenty-five pounds. (Employer's Trial Exhibits Nos. 2 and 27.)

Wilson was also seen by three health care providers with respect to his alleged psychological/psychiatric injuries. He was referred by Dr. Lowry to Ms. Linda Thoms, a licensed social worker. Ms. Thoms has provided therapy sessions to Petitioner from December 1997 through the present. Ms. Thoms diagnosed Petitioner with depression secondary to chronic pain. Thoms stated that Wilson's anger, depression, and sense of loss were so severe that they would prevent him from having any meaningful interaction with other persons in a work environment. She further diagnosed him with post-traumatic stress disorder, and testified that Wilson reported auditory hallucinations. Under cross-examination, Ms. Thoms conceded that Wilson possessed at least average intelligence, and that he understood that his statements to her regarding his psychiatric condition would later be used in support of his contentions of disability. (Claimant's Trial Exhibit No. 23.)

Petitioner has also been seen by Dr. Steven Kamp, a psychiatrist to whom Wilson was referred by Ms. Thoms and Dr. Lowry. Dr. Kamp also diagnosed Wilson with major depression with psychotic features, and opined his condition resulted from his work accident of December 1988. Dr. Kamp opined that Petitioner was then not capable of working in any capacity because of the degree of his symptomatology. However, Dr. Kamp conceded on a cross-examination that Petitioner was not permanently

disabled from his psychiatric illness. He stated that Petitioner was improving as a result of his psychiatric treatment, and that this treatment should continue to help him improve. (Claimant's Trial Exhibit No. 22.)

Wilson was also seen by Dr. Henry A. Maggio, a psychiatrist retained by the Employer and Carrier. Dr. Maggio diagnosed Wilson with moderate major depressive disorder without psychosis. Dr. Maggio further stated there was a history of alcohol and pain medicine abuse, and opined that Wilson suffered from a personality disorder with features of paranoia, dependency and obsessive/compulsive behavior. He further diagnosed Wilson with a pain disorder associated with both psychological and general medical factors. Dr. Maggio disagreed with the implantation of the morphine pump as it would cause dependency on medication.

Dr. Maggio testified that the Petitioner's traits did not preclude him from being gainfully employed, although due to the current nature of his depression he was unable to return to immediate employment. Dr. Maggio opined that with continued medical treatment and psychotherapy, Petitioner would eventually be able to find employment. He did not believe that Wilson needed in-patient treatment, and specifically disagreed with the diagnosis of post-traumatic stress disorder. Dr. Maggio agreed with the statements of Dr. Kamp and Ms. Thoms that employment can be therapeutic, and specifically stated that in Wilson's case it would be in his best interest. (Claimant's Trial Exhibit No. 20 and Employer's Trial Exhibit No. 7.)

The deposition testimony of Timothy E. Crabtree, a licensed private investigator, was also admitted into the trial record, as were surveillance videotapes taken by Mr. Crabtree. That surveillance took place in October 1995, March 1997, and March 1998. The 1995 and 1998 surveillance videos showed Wilson performing errands, walking up and down steps without a limp, driving, and climbing in and out of his vehicle without any apparent difficulty. The 1997 surveillance displayed Wilson performing construction on a garage adjacent to his home. Petitioner is shown repeatedly bending over, carrying tools, climbing a ladder, reaching above his head to hammer and drill. He was also shown repeatedly carrying lumber and a ladder. At no time did Petitioner appear to be in pain or having any physical difficulty in movement or performance of the tasks at hand.

In his "Statement of the Case" Petitioner contends that his benefits were terminated in 1997 because he would not agree to settle his claim. However, the evidence clearly establishes that Employer and Carrier actually terminated Petitioner's benefits following surveillance that revealed Wilson's true physical capabilities. It was not until Wilson was aware he had been surveilled, and his benefits had been terminated, that he made any claim for psychological or psychiatric injury.

Petitioner contended before the trial court and each appellate court, respectively, that his date of MMI was December 19, 1989; that his condition was permanent since that date; and that such permanent and total disability was the result of his physical condition alone. The trial court found to the contrary and both appellate courts affirmed. To the extent there was any ambiguity in the

totality or permanency of Petitioner's physical condition, the Fifth Circuit properly remanded the case to the Administrative Law Judge.

SUMMARY OF ARGUMENT

This case concerns the nature and extent of Petitioner David Wilson's disability and his entitlement to workers' compensation benefits under the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. 901 *et seq*. In the proceedings below, Petitioner claimed disability by virtue of a lumbar injury and a psychiatric condition. In the instant Writ Application, Petitioner seeks permanent and total disability for his lumbar injury alone. Administrative Law Judge ("ALJ") Lee J. Romero, Jr. concluded that Petitioner reached maximum medical improvement with respect to his lumbar injuries on May 19, 1997 but remained temporarily totally disabled with respect to his psychiatric condition. Despite cross appeals to the Benefits Review Board ("BRB"), that administrative body affirmed *en toto* the decision of the ALJ. Petitioner then sought review by the United States Fifth Circuit Court of Appeals and Respondents, Atlas Wireline Services and CNA Insurance Companies (Wilson's employer and its insurance carrier), accepted the findings of the two lower administrative courts.

The Fifth Circuit flatly rejected Wilson's argument that he was entitled to Permanent Total disability benefits from 1989 based on his back injury alone and remanded the case to the Administrative Law Judge for clarification. Specifically, the Court remanded for clarification of

whether Wilson was totally disabled from a combination of both his back injury and his alleged psychological impairments. Presently, Petitioner asks this Court to make the very factual determinations made at the trial level and which the Fifth Circuit has either affirmed or remanded to the ALJ for clarification.

Respondents submit that the ALJ and BRB properly determined the date of maximum medical improvement ("MMI"). The ALJ and BRB properly rejected Petitioner's contentions of permanent and total disability, an earlier date of MMI, and sheltered employment. The evidence supporting the ALJ and BRB decisions was substantial. The lower courts' decisions were grounded in fact and law and should not be disturbed on appeal. To the extent there was any ambiguity in the ALJ's findings, the case has been remanded for clarification by the Fifth Circuit.

Respondents do not dispute the ALJ's findings of permanency regarding Petitioner's back condition. However, Petitioner's contention that such a finding entitles him to an award of permanent and total disability must be rejected. While the ALJ found no suitable alternative employment for Wilson, that decision was based upon a combination of both physical and psychological factors that resulted in temporary total disability. The medical and vocational evidence established that, with treatment, Wilson's mental condition can be resolved, after which Petitioner will be able to obtain gainful employment. To the extent this Court has a question as to the ALJ's finding with respect to the nature and extent to

Petitioner's disabilities, it should allow the matter to be remanded for clarification as ordered by the Fifth Circuit.

ARGUMENT AND AUTHORITIES

Petitioner's statement of the question presented to this Court actually presents several factual issues for the Court's consideration, none of which is properly before this court. Petitioner ultimately asks this Court to make the factual determination that the Fifth Circuit Court of Appeals remanded to the ALJ for clarification. The Administrative Law Judge ("ALJ") is the proper fact finder in LHWCA cases, and an appellate court should not substitute its own factual determinations when the ALJ's are based upon substantial evidence. *Metropolitan Stevedore Company v. Rambo*, 521 U.S. 121, 140; 117 S.Ct. 1953, 1964; 138 L.Ed. 2d 327 (U.S. 1997). Any questions of fact left unclear should be remanded to the ALJ. *Id.* As a factual matter, Petitioner's physical condition as it relates to his lumbar spine has not been determined to be permanent and total. As such, the rule of law expounded by Petitioner in his "Statement of Question Presented" and throughout his Petition has no application. It is for the trial court to determine factual matters such as the nature and extent of a claimant's disability and maximum medical improvement. The Fifth Circuit understood this and properly remanded the case for clarification. Therefore, this Court need not consider Petitioner's Writ Application. Nevertheless, Respondents now address each of Petitioner's factual contentions separately.

The Date of Maximum Medical Improvement with Respect to Petitioner's Lumbar Injury was May 19, 1997.

Wilson contends that the proper date of maximum medical improvement (hereinafter "MMI") was actually December 19, 1989. Admittedly, Dr. Lowry initially placed this date (and then a date in 1990) for MMI after Wilson's first surgery. Shortly thereafter, Wilson was capable and did return to the work force as an automotive parts sales person. However, Wilson's complaints continued and increased to the point that he was placed back on temporary total disability, and underwent additional significant treatment over the next several years with Dr. Lowry. This included additional surgical procedures, the implantation of a spinal cord stimulator, and a morphine pump. Dr. Lowry testified very clearly that MMI was obtained on May 19, 1997, because following the insertion of the morphine pump, Petitioner's condition had remained stable enough to reach MMI. (Employer's Trial Exhibit No. 26, p. 30).

Petitioner's argument with respect to maximum medical improvement is misguided. Petitioner argues that a report issued by Dr. Lowry in 1989 is controlling even though that same physician changed the date of MMI several times and ultimately designated May 19, 1997 as the proper date of MMI. No physician including Dr. Lowry disputes that May 19, 1997 is the proper date of MMI with respect to Petitioner's lumbar condition.

In judicially determining May 19, 1997 as the date of MMI, the ALJ considered not only the testimony of Dr. Lowry but also the medical records and testimony of all other treating physicians, as well as Petitioner's own

testimony regarding his condition. The ALJ specifically noted that no other physician contested Dr. Lowry's opinions, and that, in fact, there was no dispute among any of the physicians regarding Petitioner's physical injury. The ALJ examined this issue twice (once in his initial opinion and later upon a motion to reconsider) and both the ALJ and BRB found the medical evidence clear as to a May 19, 1997 date of MMI. This finding is supported by substantial evidence and cannot be overturned based on a single medical report when that medical report was, in fact, in evidence and considered by the fact finder.

The date on which an injured worker's condition becomes permanent is primarily a medical determination. Thus, medical evidence must establish the date on which the Petitioner has received the maximum benefit of medical treatment such that his condition will not improve. *Mason v. Bender Welding & Machine Co.*, 16 BRBS 307 (1984). A judge should rely on the medical evidence and physicians' opinions regarding permanency in establishing a date of MMI. *Dixon v. John J. McMullen & Associates*, 19 BRBS 243 (1986). Where the medical evidence indicates that the injured worker's condition is improving and the treating physician anticipates further improvement in the future, it is not reasonable for a judge to find that maximum medical improvement has been reached. *Id.* Similarly, where the treating physician has opined that surgery is necessary in the future and that an injured worker should be re-evaluated in several months to check for improvement, it is reasonable for an ALJ to conclude that a claimant's condition is temporary rather than permanent. *Dorsey v. Cooper Stevedoring Co.*, 18 BRBS 25 (1986); *Stoute v. Shea-Ball*, 13 BRBS 755 (1981).

In the instant case, the record is replete with medical evidence suggesting that Dr. Lowry's 1989 and 1990 assessments of MMI were premature. When a claimant's condition deteriorates, then the initial MMI date is not controlling. *Elliott v. CMP Tel. Co.*, 16 BRBS 89 (1984). It is well documented that additional treatment and surgeries were at first recommended, then implemented over the course of eight years. Despite Petitioner's allegations of a "worsening" of his condition, the testimony of Dr. Lowry established that treatment and surgeries over that eight year span caused marked improvement in Wilson's condition, to the point where he stabilized in 1997. Accordingly, the ALJ's decision establishing maximum medical improvement on May 19, 1997 is eminently reasonable, and the Benefits Review Board was correct in accepting it. The Fifth Circuit Court of Appeals found that substantial evidence supported a finding that Petitioner reached MMI with respect to his alleged back injury in May of 1997. Accordingly, this Court need not disturb this finding.

The Administrative Law Judge did not Adjudicate Petitioner Totally Disabled with Respect to Petitioner's Lumbar Injury.

The burden of proving the nature and extent of disability rests with a claimant. *Trask v. Lockheed Shipbuilding Construction Co.*, 17 BRBS 56, 59 (1980). While Respondents do not dispute that Petitioner suffered some level of disability as a result of his work-related accident, the record of the ALJ's proceedings cannot support any finding of permanent and total disability. Disability is an economic concept based upon medical foundation.

Rinaldi v. General Dynamics Corporation, 25 BRBS 128, 131 (1991).

In the instant matter, the trial court properly concluded that Petitioner reached maximum medical improvement on May 19, 1997 based upon the testimony of his treating neurosurgeon, Dr. Michael Lowry. However, even Dr. Lowry conceded that Petitioner would be capable of a sedentary type of work provided it were within lifting restrictions of no more than 25 pounds occasionally and 10 pounds repetitively. (Employer's Trial Exhibit 26 pp. 35-36.) Dr. Wendell Helveston also opined that Wilson did not need any further neurosurgical treatment. Dr. Helveston testified that Petitioner could also return to some sort of employment within the physical restrictions of not lifting greater than 25 pounds. (Employer's Trial Exhibit Nos. 2 and 27.)

More telling than any physician's opinions regarding Wilson's limitations was the conduct that the ALJ observed in surveillance videos of Petitioner. Despite Wilson's self-serving complaints of pain to the trier-of-fact and to his health care providers (who conceded Wilson was intelligent enough to understand the concept of secondary gain), surveillance established Wilson performing heavy manual labor. In addition to displaying Wilson's ability to drive a vehicle, enter and exit a vehicle and ambulate free of any discernable limitations, video evidence established Wilson engaging in construction activities. These included carrying lumber and various tools, including a circular saw and a 12-foot ladder. Wilson was observed climbing up and down a ladder on

multiple occasions, hammering over his head, and repeatedly bending at the back and knees while he performed general carpentry.

Although the ALJ blithely stated he found the surveillance videos unpersuasive as they failed to establish that Petitioner was not "suffering pain", Petitioner's "pain" clearly was not a contraindication to strenuous physical labor. Wilson admitted he was not in so much pain as to seek immediate medical attention following this activity. Taken as a whole, Respondents submit that the surveillance clearly established a wage earning capacity on behalf of Wilson.

While the Employer and Carrier have the burden of establishing suitable alternative employment, they are not required to find specific jobs for Petitioner; instead, they need only demonstrate the availability of general job openings in certain fields in the surrounding community. *New Orleans (Gulf wide) Stevedores v. Turner*, 661 F.2d 1031 (5th Cir. 1981); *P&M Crane Company v. Hayes*, 930 F.2d 424 (5th Cir. 1991); *Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30 (5th Cir. 1992), *affirmed*, 27 BRBS 192 (1993).

Respondents' vocational rehabilitation expert, Dr. Larry Stokes, testified that, although Wilson was incapable of heavy manual labor per his physician's restrictions, he had several skills which were transferable to other occupations. Overall, Dr. Stokes opined that Wilson had an above-average aptitude and ability to learn new tasks. (Employer's Trial Exhibit 30, pp. 18-20.)

Even Donald Carlisle, Wilson's vocational expert, conceded that if Wilson's psychological conditions

improved, he would be able to work in a sedentary/light position. (Employer's Trial Exhibit No. 16, p. 4.)

The best evidence of these better-than-average intellectual skills is contained in the research, writing, and arguments Petitioner has made in relation to the instant litigation. Although he is mistaken on the application of the law, Petitioner has clearly demonstrated an above-average intellect and ability to perform sedentary work. Respondents respectfully suggest Wilson's efforts before this Court, the BRB and the Fifth Circuit belie any assertions that he is incapable of performing any type of employment.

Every time the ALJ examined an employment opportunity for the Petitioner, he found the employment opportunity was unsuitable based at least in part to Petitioner's mental condition. While the ALJ did make a reference to Petitioner's entitlement to "permanent total disability," that reference should not be read out of context or otherwise misconstrued. The entire discussion preceding that finding considered the mental and physical disabilities in concert. Any finding of total disability contemplated both mental and physical disabilities. The record is replete with evidence that improvement in the Petitioner's psychological condition would allow him to obtain some form of employment and thus change his status from temporary total disability to permanent partial disability.

While Wilson admittedly remains temporarily totally disabled with respect to his psychological injuries, the ALJ clearly did not intend that Wilson was totally disabled with respect to his lumbar injury. The ALJ made no finding as to suitable alternative employment exclusive to

Wilson's back injury. Petitioner's orthopedic limitations are, in fact, not totally disabling. It follows that Petitioner's contentions of permanent and total disability must be rejected.

Petitioner is not permanently disabled as a result of his alleged psychological problems. This is supported by the testimony of his own treating psychological/psychiatric health care providers. The testimony of Ms. Linda Thoms, Petitioner's social worker/therapist, established that her treatment is ongoing. From a psychological standpoint, Thoms stated that Wilson has not yet reached maximum medical improvement. (Claimant's Trial Exhibit 23, pp. 57-58.) Dr. Peter Kamp, Wilson's treating psychiatrist, also opined that Petitioner is not presently permanently disabled from a psychiatric illness, and stated further that his treatment should continue to help him improve. (Claimant's Trial Exhibit 22, p. 50.) Dr. Henry Maggio, Employer's psychiatrist, agreed with Thoms and Kamp's assessments, and opined that with continued medication and psychotherapy, Wilson would continue to receive a positive benefit and would eventually be able to find employment. (Claimant's Trial Exhibit 20, pp. 28-31.)

Before an injured worker's condition can be found to be permanent, both physical and mental factors must be considered. When a claimant suffers both physical and emotional trauma and needs both physical and psychological treatment before he can return to work, he is not yet at the point of maximum medical improvement and should still be considered temporarily disabled due to the psychological effects of his injury. See *Jenkins v. Kaiser Aluminum & Chemical Sales*, 17 BRBS 183 (1985).

Petitioner's arguments to the contrary notwithstanding, the record clearly establishes that Wilson's psychological treatment is still providing benefit and improvement to his mental condition. Furthermore, with respect to Wilson's psychological condition, the BRB specifically recognized that Ms. Thoms' opinion was uncontradicted in that Petitioner requires continuing treatment and that his condition has not reached maximum medical improvement. Accordingly, Wilson has not yet reached MMI with respect to the mental disability, and the BRB correctly found the ALJ to have properly adjudicated him temporarily totally disabled based upon competent medical evidence. To the extent there was any ambiguity in the pronouncement of the ALJ's factual findings, the Fifth Circuit properly remanded for clarification.

CONCLUSION

The ALJ never made any finding that Wilson is permanently and totally disabled by virtue of his lumbar injuries alone. The evidence clearly established that but for Wilson's psychological condition, for which he remains temporarily totally disabled, suitable alternative employment existed within the limitations set forth by the treating and evaluating physicians.

To the extent the ALJ's factual determinations were ambiguous, the case was properly remanded for clarification by the Fifth Circuit Court of Appeals. The only issues presented to this Honorable Court are factual determinations which are properly left to the ALJ. Respondents

therefore respectfully submit that there is no basis for this Court to grant Certiorari.

Respectfully submitted,

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